

PUBLIC UTILITIES COMMISSION

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March 26, 1997

VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20036

RECEIVED
MAR 27 1997
FEDERAL COMMUNICATIONS COMMISSION

Re: CC.Docket No. 96-115

Dear Mr. Caton:

Enclosed you will find an original and four copies of **REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO SPECIFIC QUESTIONS ON THE PUBLIC NOTICE PURSUANT TO THE NOTICE OF PROPOSED RULEMAKING.**

Also enclosed is one additional copy to be conformed and returned to me in the enclosed self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, please call me at (415) 703-1952.

Sincerely,

A handwritten signature in cursive script that reads "Mary Mack Adu".

Mary Mack Adu
Attorney for the People of the
State of California and the Public
Utilities Commission of the State
of California

MMA:mbh

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ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of the Telecommunications)
Act of 1996;)
)
Telecommunications Carriers' Use of)
Customer Proprietary Network Information)
and Other Customer Information)
_____)

CC Docket No. 96-115

**REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA
AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
TO SPECIFIC QUESTIONS ON THE PUBLIC NOTICE PURSUANT
TO THE NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") hereby submit their reply comments in the above-docketed proceeding. California will limit its reply to the following areas: (1) third party treatment of affiliates with respect to proprietary information; (2) responses to other parties interpretation of the joint marketing waivers contained Section 272(g)(3); and (3) BOC solicitation on behalf of non-affiliates and the First Amendment. California appreciates the opportunity to comment on the important issues relating to protection of customer proprietary network information (CPNI) and competitive safeguards. As stated in our opening comments, California has a strong history of protecting customer proprietary network information, and this is a reflection of customers' expectations in California. Along with a strong sense of privacy, the CPUC has been actively opening

local markets to competition for over two years and remains very interested in developing a regulatory framework that promotes competition with a minimum of regulations.

II. DISCUSSION

A. The Treatment of Affiliates as Third Parties

A common theme among the Bell Operating Companies (BOCs) and other local exchange companies (LECs) is the notion that their affiliates should not be treated as third parties for purposes of CPNI.¹ These parties are further advocating that their affiliates should be able to use customer information in their possession to sell new or different services or products to the customers with minimal approval procedures. Proposals include oral or written notice and "notice and opt-out" approval method. None of the parties supporting dual standards for customer approval could cite specific language that expressly supports the dual standard interpretation in the 1996 Telecommunications Act (1996 Act). Rather, parties based their interpretation in large part upon customer surveys which allegedly found that customers expect companies that have customer information in their possession will use it for marketing and sales purposes. To support its "customer expectation" theory, Pacific Telesis provided greater detail than others about its customer survey. While it maybe sensible to model customer privacy protections based on expectations, our experience in California is that the results from customer surveys are highly controversial. If the FCC deems customer expectation to be a relevant factor in implementing section 222, it should provide an opportunity for all parties to comment on any surveys the FCC will use in its decisionmaking process.

¹ Some of the entities subscribing to this point of view include Alltel, Bell South, Pacific Bell and USTA.

Unless and until that event transpires, customer surveys should not be given any weight in a consideration of whether or not affiliates should be treated as third parties.

The FCC must balance easier access to CPNI by BOC affiliates (through less burdensome customer solicitation process) with the competitive effects of a dual CPNI solicitation standard. In our opening comments, the CPUC argued that BOCs must follow the nondiscrimination provisions of section 272(c)(1) if CPNI is released to the affiliate. The CPUC was concerned that both customer privacy be protected, and nonaffiliates and affiliates have the same marketing opportunity as directed in section 272. While the CPUC has not determined the state of competition in local telephony markets, the CPUC is concerned that CPNI is vital to marketing and thus to the development of competitive markets. In many other issues, both the FCC and the CPUC have concluded that nondiscriminatory access to incumbent LEC (ILEC) resources promotes competition. The CPUC is not convinced by the BOCs opening comments that CPNI is inherently different from other network resources and should therefore not be offered on a nondiscriminatory basis.

B. Section 272(g)(3) Does Not Apply to Customer Solicitation for Use of CPNI

In addition to recommending a dual standard for soliciting customer information in their comments, the BOCs argue that the joint marketing exemption in section 272(g)(3) allows the BOCs to solicit customer approval only for its affiliate, and that terms and conditions for sharing that information need not be the same for nonaffiliated carriers. The CPUC does not agree with this interpretation because the BOCs incorrectly interpret section 272(g) as a blanket exemption from the nondiscrimination requirements

of section 272. When the entire section is reviewed, the CPUC believes Congress intended that affiliate and nonaffiliate carriers would be treated equally by BOCs. Section 272 was designed to create a fair market place and prevent undue competitive advantages being bestowed on BOC affiliates. Section 272(g) clearly allows BOCs and their affiliates to market services in a manner similar to other carriers (i.e., one-stop shopping). The BOCs' broader interpretation of section 272(g) directly contradicts goals contained in the rest of section 272.

In its opening comments, the CPUC advocated that when CPNI is directly disclosed to an affiliate, the nondiscrimination requirements of section 272(c)(1) apply. When the BOC jointly marketed but did not disclose the information to its affiliate, section 272(c)(1) did not apply. Implicit in this argument was the interpretation that section 272(g) was designed to allow affiliates and BOCs to market jointly, but sharing and soliciting CPNI for sole use of a BOC affiliate was not a part of joint marketing. The BOCs' blanket interpretation of section 272(g) provides the BOC affiliate with an undue competitive advantage and violates the spirit of section 272(c)(1).

The BOCs argue, in part, that many other carriers have extensive CPNI about their customers and, therefore, the CPNI the BOC has is either not valuable or is not predominately held by the BOC. The CPUC agrees that many carriers collect CPNI about their customers, but this argument is not persuasive because the CPNI commonly held by interLATA carriers is for interLATA toll usage. These carriers typically do not have CPNI for local usage and local customer services. Thus, the very type of marketing that section 272(g) exempts (joint marketing of interLATA and local services) is the same

marketing activity for which BOCs have almost exclusively all the CPNI, and which constitutes a significant portion of the services that can be marketed. The CPUC reiterates its position that access to CPNI must be provided in a nondiscriminatory manner consistent with section 272(c)(1).

C. The First Amendment Is Not An Absolute Legal Barrier to BOC Solicitation on Behalf of Non-Affiliates.

In our Further Comments, the CPUC argued that BOCs must disclose CPNI to their affiliates and nonaffiliated carriers under the same terms, conditions, and in the same timely manner. The CPUC suggested that “a BOC may fulfill its nondiscrimination obligation by offering to solicit customer approval to release CPNI for both its affiliates and unaffiliated entities through the same solicitation process. The BOC does not have to offer to solicit customers through a different process for unaffiliated entities.” (CPUC Comments, p. 7) This suggestion is consistent with section 272(c)(1)’s requirement that BOCs must treat other entities in the same manner as they treat their section 272 affiliates. However, some commenters oppose the BOCs’ soliciting customer approval on behalf of unaffiliated entities on First Amendment grounds.

Pacific Gas & Electric Co. v. PUC, 475 U.S. 1 (1985) was cited as a leading authority in support of the parties’ First Amendment argument. This plurality decision is inapposite for several reasons. The issue in *PG&E* was whether the CPUC may require a privately-owned utility to include in the “extra space” of its billing envelopes speech of a third party with which the utility disagrees. The CPUC had ordered PG&E to permit Toward Utility Rate Normalization (TURN), a consumer group that intervened in a rate proceeding, to use the extra space in PG&E’s billing envelopes to disseminate its

messages. By contrast, the issue and the facts here are completely distinguishable from *PG&E*. In that case, PG&E had argued that it had a First Amendment right not to help spread a message with which it disagrees. The focus was on speech content, and the Court found that access to the envelopes was not content neutral.² Here, the FCC's conclusion that BOCs must treat all other entities in the same manner as they treat their section 272 affiliates is necessary to ensure that BOCs provide the same goods, services, facilities, and information to its affiliates and nonaffiliated carriers on the same terms and conditions.³ In the CPUC's opinion, speech content is not in issue because the BOCs would be required to merely inform the customers of the opportunity to share their CPNI with other carriers. The CPUC suggested BOC solicitation to nonaffiliates as a method for providing nondiscriminatory access to customer CPNI on the same terms, conditions and timely manner as it is provided to BOC affiliates.

Furthermore, the Court clearly stated that "[n]otwithstanding that it burdens protected speech, the Commission order could be valid if it were a narrowly tailored means of serving a compelling state interest. [citations omitted]."⁴ The opening up of the telecommunications networks to competition is a compelling interest, not only from the state's point of view but also nationally. It is essential to effectuating Congress' mandate calling for the establishment of a national, competitive telecommunications network. California's recognition of this competitive goal predated the passage of the Telecommunications Act of 1996. California undertook major strides in this direction

² See *PG&E*, *supra* at 13.

³ *First Report and Order in the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, paragraph 202.

when it issued its report entitled "*Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure*" and the state Legislature passed Public Utilities (PU) Code Section 709.5 which articulates the state's intention that "all telecommunications markets subject to commission jurisdiction be opened to competition not later than January 1, 1997."

III. CONCLUSION

By this reply, the CPUC affirms its position that strong CPNI safeguards are necessary not only to protect customer privacy, but also to ensure that incumbents are not allowed to use their access to customer information to solidify their market power and thereby disadvantage competitors. We believe that customers should have control over their CPNI, and its disclosure should not occur without verifiable customer approval.

Respectfully submitted,

PETER ARTH, JR.
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By:


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Utilities Commission of the State
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March 26, 1997

⁴ *PG&E, supra* at 19.

CERTIFICATE OF SERVICE

I, Mary Mack Adu, hereby certify that on this 26th day of March, 1997, a true and correct copy of the foregoing in **COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE PUBLIC NOTICE PURSUANT TO THE NOTICE OF PROPOSED RULEMAKING** was mailed first class, postage prepaid to all known parties of record.



Mary Mack Adu